1992

Robert William Labrum v. Utah State Board of Pardons : Reply Brief

Utah Supreme Court

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

ROBERT WILLIAM LABRUM,

Petitioner,

vs.

Case No. 920222
Priority No. 2

THE UTAH STATE BOARD OF PARDONS, et al.,

Respondents.

- -

REPLY AMICUS CURIAE BRIEF OF UTAH STATE PRISON INMATES

- -

Amicus Curiae Brief Submitted on Behalf of the following Utah State Prison Inmates: Michael Patrick Moore, Jerry Auble, R. Wagner Jones, Bryant Jolly, Merrill Mackay, Gary Edwards, Dan White, Frank Zunpano, Steven Montague, Thomas Opfar, and Roland Pitt.

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This Brief is written in response to the brief of Respondents filed November 16, 1992. While it is specifically filed on behalf of the named inmates who appear as amicus curiae, this brief essentially represents the position of every inmate in the Utah State Prison system who must at one time or another appear before the Utah State Board of Pardons.

The Brief of Respondents is basically broken into five divisions. First, Respondents attack the particular facts and circumstances of petitioner Robert William Labrum and contend that this matter is not properly before this Court because of the procedures below. Second, Respondents argue that the Foote decision of this Court is incorrect and that sentencing due process rights should not apply to Utah State Prison inmates in parole proceedings. Third, Respondents contend that minimal due process rights should be imposed upon the Board of Pardons if it is not a sentencing body. Fourth, Respondents argue that this

Court, in any event, is an improper forum for such a determination to be made and that the matter should be remanded to a lower court for hearing. Finally, Respondents argue as to the due process specifics of attorney representation, access to files, and evidentiary hearings.

For the convenience of this Court and the parties these answering amicus curiae will refer to the arguments made by Respondents in the same sequence as they are raised in their Brief. This method will allow this Court to more easily focus upon the arguments and counter-arguments being raised.

Before proceeding, however, it should be noted that the respondents have seemingly failed to specifically address the arguments contained in the opening Brief of these amicus curiae or that filed by the public defender. Not a single page reference to either brief is contained in the respondents' Brief. Numerous arguments made by these amicus curiae have therefore not been addressed whatsoever in the respondents' Brief while, on the other hand, arguments not raised by any party or amicus curiae are addressed by the respondents. These specific additions and omissions will be discussed in the appropriate area of the Argument portion of this Brief.

ARGUMENT

POINT I

THIS COURT MAY PROCEDURALLY ADDRESS THE ISSUE OF PAROLE DUE PROCESS RIGHTS IN SPITE OF RESPONDENTS' ARGUMENTS TO THE CONTRARY.

Respondents cite numerous factual allegations in their "Statement of the Case" which apply specifically to petitioner

Robert Labrum. (Respondents' Brief, 7-9). These amicus curiae are without sufficient information to address these assertions. It is believed, however, that these same arguments were raised and rejected by a panel of this Court on June 1, 1992.

Next, Respondents state that "the case should be brought under 65B(c), "Wrongful Restraint on Personal Liberty and Habeas Corpus Relief." (Respondents' Brief, 10). This assertion is made because petitioner Labrum "requests the Board to rehear his case based on alleged procedural deficiencies at a November 1987 hearing." (Id.). Although this statement is true, Petitioner also requested this Court to direct the Board of Pardons to disclose its entire file to Petitioner and to give Petitioner a reasonable opportunity to rebut any misinformation in its file. As such, therefore, Petitioner has correctly filed an extraordinary writ asking this Court to order corrective action of a state agency.

The case of Foote v. Utah Board of Pardons, 808 P.2d 734 (Utah 1991) upon which this case is based, was originally brought as an extraordinary writ proceeding requesting mandamus by this Court. In addition to this Court's approval of such procedural device, other state courts have also approved the use of mandamus to review the constitutional procedures of state parole systems. For example, the Indiana Supreme Court in Murphy v. Indiana Parole Board, 397 N.E.2d 259, 261 (Ind. 1979) stated the following:

> It is true that there is no right to an appeal, in the usual sense, from the decision of the Parole Board, but Due Process requires that judicial review be available to insure that the requirements of Due Process

> have been met and that the Parole Board has acted within the scope of its powers.

See also Donnell v. Commonwealth, 434 A.2d 846 (Pa. 1981); Goldsworthy v. Hannifin, 468 P.2d 350 (Nev. 1970).

It should also be noted that mandamus is a broader remedy than is habeas corpus. Mandamus can be utilized to make sweeping changes in the procedures of a governmental agency. See e.g., Davis County v. Clearfield City, 756 P.2d 704 (Utah App. 1988). Habeas Corpus actions, on the other hand, concern specific liberty interests of an individual and concern the facts and circumstances of his or her particular case rather than correction of the system as a whole. For example, the normal defendant in a habeas corpus action is the prisoner's custodian. The Board of Pardons is an additional party if parole proceedures are disputed. Estes v. Van Der Veur, 824 P.2d 1200 (Utah App. 1992). For these reasons, therefore, the procedural context of this case is proper.

Based upon their erroneous argument that this matter must be characterized as habeas corpus, Respondents next contend that any such action is barred by Section 78-12-31.1, U.C.A. which requires that a habeas corpus action must be commenced within three months from the time the petitioner knows of grounds for relief or should have known of such grounds. (Respondents' Brief, 11-12). Of course , this argument is inapplicable since a petition for extraordinary writ does not have such a time limitation. However, if this statute is deemed applicable to this litigation then the statute itself must be held unconstitutional. Both the United States Constitution and the Utah Constitution provide that the "privilege of the writ of habeas corpus shall not be suspended."

Article 1, Section 9; Article 1, Section 5. The statute relied upon by the state would clearly suspend the writ of habeas corpus after the three month period had expired even though a petitioner has a meritorious constitutional claim. Moreover, in some instances a prisoner is unable to procedurally file a writ of habeas corpus regardless of his knowledge because of other requirements such as in cases where his direct appeal has not yet been decided. Thus, the state's effort to procedurally eliminate this appeal must fail.

POINT II

THE DECISION OF THIS COURT IN FOOTE IS CORRECT AND THE ARGUMENTS NOW ASSERTED BY RESPONDENTS ATTEMPT TO PUT FORM OVER SUBSTANCE IN MAINTAINING THAT THE BOARD OF PARDONS DOES NOT DETERMINE THE LIBERTY INTEREST OF A PRISON INMATE.

Respondents devote a great deal of space in their brief to an attack upon this Court's decision in Foote v. Utah Board of Pardons. (Respondents' Brief, 13-30). Apparently, Respondents want a second "bite at the apple" in an effort to decimate or seriously weaken this Court's opinion in Foote. These amicus curiae welcome the opportunity to address the arguments now being made by the State since there is no question but that this Court was absolutely correct in its analysis and conclusions reached in the Foote decision.

The State vigorously argues that the Board of Pardons is not a sentencing body and relies upon numerous statutory citations and case decisions to support its assertion. (Respondents' Brief, 13-17). The respondents argue that the term "sentencing" must be strictly construed and that it must only refer to the process in

which a judge imposes a range of years to a convicted defendant. Respondents argue that "parole is merely a rehabilitation tool, not a part of the criminal process" and that it does not "have authority to enhance or modify a sentence imposed by a trial court." (Respondents' Brief, 15-16). These arguments are completely without merit.

If the only power of the Board of Pardons was, as a matter of grace, to allow the early release of an inmate who was serving a definite number of years, then the arguments of Respondents would have some validity. In such a case, it can be argued that the trial court has set the maximum number of years of incarceration that a defendant will serve, and absent the express intervention of the Board of Pardons, the defendant will serve the entire term. Here, on the other hand, no such situation exists. The sentencing court establishes a range of years the defendant may be incarcerated. Whether a defendant serves one year or 15 years requires the affirmative action of the Board of Pardons. The Board thus has complete control over the liberty of the inmate during the entire range of sentence. In essence, therefore, the Utah system of sentencing is a two-stage process in which the judge establishes a range and the Board of Pardons establishes the exact parole date. Respondents themselves note, "the Board's role is to determine the physical conditions under which the offender's sentence is to be served, via prison or on parole." (Respondents' Brief, 16).

This same "form over substance" argument was raised by the U.S. government in Williams v. Turner, 702 F.Supp. 1439

(D.Mo. 1988). In that case the defendant was sentenced to a determinate term of ten years incarceration. However, the Federal Board of Pardons in following its matrix guidelines would normally parole such an individual between 24 and 36 months.

The defendant was required to give testimony against another prisoner in an ancillary proceeding and based upon such testimony the Federal Board ordered that he serve a total of 80 months. The government argued that the petitioner suffered no penalty as a result of his testimony and was not entitled to assert a liberty interest giving rise to due process. The Federal District Court rejected this argument and stated:

> However, does one whose presumed parole date is pushed beyond that recommended by the sentencing guidelines, due to considerations of compelled testimony, "suffer no penalty?" The respondents maintain that no penalty is suffered since the Commission's action "did not result in a new sentence or an enhanced sentence; petitioner's sentence remained ten years."....
> The petitioner states that such reasoning places form before substance because though "the mathematical term of petitioner's sentence (10 years) is not lengthened, the term of confinement is clearly lenghtened."....
>
> The Court concludes that a penalty is suffered because a liberty interest is involved. A substantial liberty from legal restraint is at stake any time the government makes decisions regarding parole or probation. Liberty from bodily restraint always had been recognized as the core of the liberty interest protected by the Due Process Clause from arbitrary government actions. Ingrahm v. Wright, 403 U.S. 651 (1977). Id. at 1445.

It is equally absurd to argue that constitutional sentencing protections should be afforded to a defendant when a court imposes a sentence of five years to life but should not be imposed upon the Board of Pardons when the term "life" is actually converted into a fixed number of years. It is clearly the liberty interest

of the inmate during his incarceration which this Court in Foote wished to protect in stating that the Board of Pardons does participate in the sentencing process.

The respondents have similarly twisted their discussion of Morrissey v. Brewer, 408 U.S. 471 (1972). (Respondents' Brief, 22-23). Respondents attempt to use the Morrissey decision to argue that the establishment of a parole date is not a part of the criminal process. In fact, however, the Morrissey decision did not in any way addressed Iowa's indeterminate sentencing system but instead was solely directed to parole revocation proceedings. As to those proceedings the Court clearly found that due process protections applied. The Court held that the liberty of a parolee who is in the community includes many of the core values of unqualified liberty and that its termination inflicts a "grievous loss" on the parolee and often on others. "By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." 408 U.S. at 482.

The Supreme Court's subsequent decisions in Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) and Board of Pardons v. Allen, 482 U.S. 369 (1987) clearly establish that this "liberty" interest requires protection in cases not involving revocation but in those in which the original parole is being determined.

In its efforts to argue that the Board of Pardons does not act as a sentencing body the respondents state, "Offenders who have committed similar crimes, regardless of the district in

which the crime was committed or the sentencing court, receive more uniform terms of incarceration when the releasing authority has a broader picture of the crimes committed throughout the state." (Respondents' Brief, 25). In other words, Respondents maintain that the Board of Pardons is able to impose equal sentences to equal criminal conduct because of the indeterminate sentencing procedure now being utilized.

In the Federal system, this same argument has been advanced both under the Parole Commission and Reorganization Act of 1976 and the Sentencing Reform Act of 1984. Under the former, the United States Parole Commission was required by statute to promulgate guidelines for the exercise of its parole power. "These guidelines are meant to reduce the disparity in treatment of similarly situated inmates by providing 'a fundamental gauge by which parole determinations are made.'" H.R. Conf. Rep. No. 838, 94th Cong., 2d Sess. 26, reprinted in 1976 U.S. Code Cong. and Admin. News, 335, 359. Congress thus intended that the guidelines "serve as a national parole policy which seeks to achieve both equality between individual cases and a uniform measure of justice." Id. A number of Federal courts have held that the guideline formulation for uniformity creates a liberty interest requiring application of due process of law. Evans v. Dillahunty, 662 F.2d 522 (8th Cir. 1981); Solomon v. Elsea, 676 F.2d 282 (7th Cir. 1982); Williams v. Turner, 702 F.Supp. 1439 (D. Mo. 1988); Dixon v. Hadden, 550 F.Supp. 157 (D.Colo. 1982).

Likewise, one of the principal reasons for enacting the

Federal Sentencing Reform Act of 1984 was to create a new system of judge-ordered determinate sentences to be imposed solely upon sentencing guidelines, to establish uniformity throughout the country, and to abolish the concept of parole. Romano v. Luther, 816 F.2d 832 (2d Cir. 1987). Due process requirements clearly are applicable in all federal sentencing procedures under the new law.

Thus, the argument made by Respondents that the Board of Pardons allows uniform sentencing to occur throughout the state actually supports the concept that the Board is acting as a super sentencing authority.

In summary, this Court's statement in Foote that the Board of Pardons "performs a function analogous to that of the trial judge in jurisdictions that have a determinate sentencing scheme" is absolutely correct and the statutory, historical, and policy arguments made by the respondents do not alter this conclusion.

The State has conceded that if the Board of Pardons is deemed a sentencing body the same protections applicable to a trial court sentencing procedure are also applicable here. (Respondents' Brief, 25). Since this is clearly the case, the rights of counsel, access to reliable information, calling of witnesses, and other inherent rights of sentencing must be applied to parole hearings in order to satisfy due process and equal protection.

POINT III

EVEN ASSUMING ARGUENDO THAT THE BOARD OF PARDONS DOES NOT FUNCTION AS A SENTENCING BODY, INMATES ARE NEVERTHELESS ENTITLED TO SUBSTANTIAL DUE PROCESS PROTECTIONS.

Again, the respondents' attempt to relitigate the issues originally raised in Foote. After summarizing various federal cases concerning liberty interests, the respondents conclude, "It is obvious that the Federal Constitution does not require any procedural due process at parole hearings before the Utah Board of Pardons. (Respondents' Brief, 26-29). While these amicus curiae acknowledge the hornbook law recited by the respondents they do not acknowledge the conclusion drawn by them.

The Federal law is clear that official statutes or official regulations are not the only source of a liberty interest. A protected Federal liberty interest may also arise when "particularized standards or criteria guide the state decision makers." Olim v. Wakinekona, 461 U.S. 238 (1983). In Lucas v. Hodges, 730 F.2d 1493 (D.C. Cir. 1984) the court held that official statements of prison policy contained in internal directives of officials at the District of Columbia Detention Facility could give rise to a liberty interest even though the statements were not promulgated under the Administrative Procedure Act or published in the District of Columbia Register. Likewise, the Sixth Circuit Court of Appeals in Walker v. Hughes, 568 F.2d 1247, 1254-56 (6th Cir. 1977) found a liberty interest in policy statements issued by the Federal Bureau of Prisons and the Warden of a Federal institution even though neither had been promulgated under the Administrative Procedure standards or published in the Federal Register.

In Bills v. Henderson, 631 F.2d 1287, 1291 (6th Cir. 1980) the Court held that a liberty interest was established by a prison

rule contained in a "Adult Service Policies and Procedure Manual of the Department of Correction Guideline." The Tenth Circuit Court of Appeals in Gurule v. Wilson, 635 F.2d 782, 785 (10th Cir. 1980) found a protected liberty interest in the "Official Statement of Policy" issued by the administrator of one Colorado penetentiary. Similarly, the Seventh Circuit has held that a liberty interest may be created by "intra and inter-institutional directives containing guidelines for allowing and denying compensatory good time." Arsberry v. Sielaff, 586 F.2d 37, 47 (7th Cir. 1978).

In a concurring opinion Justice Brennan stated that to show a federally protected liberty interest "respondents must show--by reference to statute, regulation, administrative practice, contractual arrangements or other mutual understandings--that particularized standards or criteria guides the state decision makers." Connecticutt Board of Pardons v. Dumschat, 452 U.S. 458, 467 (Brennan, J., concurring). See also Hewitt v. Helms, 459 U.S. 460 where Justice Stephens stated, "It does not matter whether the state uses a particular form of words in its laws or regulations, or indeed whether it has adopted written rules at all." Id. at 486 n. 12.

These amicus curiae contend that the Sentencing Guidelines now utilized in this state by both judges and the Board of Pardons creates an expectation which gives rise to a federal liberty interest. These guidelines were created by the Utah Commission of Criminal and Juvenile Justice which consisted of judges, administrators and lawyers from all facets of the criminal and

corrective law system. These guidelines are utilized by a defendant's attorney in advising a defendant whether to plead guilty or not, are used by probation officers in preparing presentence reports, are used by sentencing judges in determining the type of sentence to be imposed, are used by prison screening officials in determining where to place an inmate for incarceration, and are used by the Board of Pardons to evaluate the time an inmate should be incarcerated. Thus, even under the conservative due process analysis by the majority opinion in Greenholtz the Utah Sentencing Guidelines create a type of expectancy which gives rise to a federally protected liberty interest.

The question of federal due process rights as it relates to the Utah Parole System, however, is essentially moot since this Court in Foote did not find it necessary to analyze federal standards in light of the clear Utah State constitutional mandate and in light of the differing types of prison systems existing in the Federal and state jurisdiction. Thus, unless this Court desires to make a federal constitutional law analysis based upon the sentencing guidelines as stated above, this Court is free to evaluate state due process free from any federal court decisions.

Respondents assert that under this Court's decision in Foote, "Apparently, the Utah Constitution no longer requires a legitimate expectation under its due process clause." (Respondents' Brief, 29). This analysis by Respondents is clearly incorrect. The Court in Foote found that the Utah system of indeterminate sentencing created a continuing liberty interest both in the trial

court and before the Board of Pardons. The intent of the framers of the Utah State Constitution was to provide due process protection whenever liberty in the form of incarceration had been jeopardized.

Similarly, the Supreme Court of Appeals of West Virginia in Tasker v. Mohn, 267 S.E.2d 183 (W.Va. 1980) criticized the majority opinion in Greenholtz as based upon an unrealistic distinction in allowing due process rights to apply to parole revocation hearings but not to original parole hearings. The Court stated:

> The problem that the Supreme Court majority has is whether expectation of parole release is co-extensive with the liberty interest in staying on parole. It doubts the legitimacy of the expectation of parole. If the expectation represents a statutory entitlement, it recognizes that due process is required....
>
> The entitlement concept is consistent with the Supreme Court's approach to due process in other context, but we believe the Court falters in its emphasis on the statutory language. The Court, prior to Greenholtz and in other contexts, recognized that "only an unusual prisoner would be expected to think that he was not suffering a penalty when he was denied eligibility of parole." Warden v. Marrero, 417 U.S. 62. (Id. at 187).

In United States Ex Rel Johnson v. Chairman, New York State Board of Pardons, 500 F.2d 925 (2nd Cir. 1974) the Second Circuit Court of Appeals stated:

> Parole was henceforth to be treated as a "conditional liberty" representing an "interest" entitled to due process protection. A prisoner's interest in prospective parole, or "conditional entitlement" must be treated in like fashion. To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration. Id. at 500. (Emphasis added).

Justice Powell in the Greenholtz decision also observed why a state parole system automatically creates a liberty interest in those that are incarcerated. He stated:

> Nothing in the Constitution requires a State to provide for probation or parole. But when a state adopts a parole system that applies general standards of eligibility, prisoners justifiably expect that parole will be granted fairly and according to law whenever those standards are met....I am convinced that the presence of a parole system is sufficient to create a liberty interest, protected by the Constitution, in the parole-release decision....From the day that he is sentenced in a state with a parole system, a prisoner justifiably expects release on parole when he meets the standards of eligibility applicable within that system. Greenholtz, supra 99 S.Ct. at 2110 (Powell, J., concurring and dissenting).

See also, Goldsworthy v. Hannifin, 468 P.2d 350 (Nev. 1970); and New Jersey Parole Board v. Bryne, 460 A.2d 103 (N.J. 1983).

Thus, this Court in Foote recognized that a state liberty interest clearly exists by the sentencing nature of the Board of Pardons under the indeterminate scheme devised by the Legislature. Moreover, this Court impliedly recognized that perhaps no other group of individuals can claim a more substantial "liberty" interest than can incarcerated inmates. In both instances, therefore, inmates appearing before the Board of Pardons are entitled to state due process protection. The arguments raised by Respondents as to whether federal or state due process should be afforded are red herrings which detract from the focus of this appeal, i.e., what due process protections should be afforded?

POINT IV

THIS COURT SHOULD DECIDE AS A MATTER OF LAW THE DUE PROCESS REQUIREMENTS OF THE BOARD OF PARDONS.

Respondents argue that they are entitled to a factual hearing in which evidence can be produced to determine the due process rights now being addressed. (Respondents' Brief, 3-32). They assert that this Court in Foote and the Court of Appeals in Northern v. Barnes, 814 P.2d 1148 (Utah App. 1991) recognize the need to have an evidentiary hearing. Parenthetically, it should be noted that the Northern case merely quotes from the Foote decision and therefore makes no separate statement as to the issue now being raised by the respondents.

There are a number of reasons why the arguments made by Respondents must fail. The concept of prison due process of law does not require factual hearings since procedures utilized by prison boards throughout the country are well established and numerous court decisions have already interpreted whether such procedures are or are not required to comply with due process. Thus, this Court as the highest tribunal of the state, should decide the due process question as a matter of law in that the concepts suggested simply do not require factual input.

Second, if this matter were remanded for a further hearing the Board of Pardons could essentially moot the proceeding as occurred in Foote. Once Foote was remanded the Board of Pardons immediately granted him parole. As such, therefore, he lost standing to complain about the prison parole system and the matter was summarily dismissed upon stipulation of counsel. This

same event could occur with petitioner Labrum.

Third, under the present statutes and regulations there is no source of funds available to represent the petitioner or the other inmates in conducting the full evidentiary hearing now contemplated by the respondents. In Foote an effort was made for appointment of counsel under the habeas corpus provisions. The lower court rejected such claim and held that counsel would have to represent Foote pro bono and essentially bear all costs of litigation. Thus, unless the respondents are willing to finance the extensive hearings they claim are required-- including the production of the alleged experts necessary to make this determination--then their arguments must be rejected on the basis of financial burden alone.

For these reasons, therefore, the matter of due process during parole hearings should be laid to rest once and for all by this Court thereby allowing Respondents to litigate any claims of undue burden in future proceedings.

POINT V

BECAUSE OF THE SUBSTANTIAL LIBERTY INTEREST WHICH EACH INMATE HAS, THIS COURT SHOULD REQUIRE EQUALLY SUBSTANTIAL DUE PROCESS PROCEDURES.

The respondents have devoted only 11 pages of their Brief to the issue raised by this Court, i.e., "What due process rights should be accorded an inmate at a Board of Pardons hearing?" Respondents have only addressed the issue of attorney representation, evidentiary hearings, and access to Board files. (Respondents' Brief, 33-43). They have failed to address in any way a number of procedures discussed by these amicus curiae in

their opening Brief. These suggested procedures include timely notice of hearing, opportunity to properly prepare, dissemination of criteria used by the Board of Pardons, limitation of evidence allowable by the Board of Pardons, implementation of stringent procedures as to matrix guidelines, and establishment of a system of limited judicial review. In addition, Respondents have not addressed these amicus curiae's claim that the procedural rights established in this case should be applied in the future to all inmates regardless of their presently scheduled parole hearings. See pages 20-46 opening Brief of these amicus curiae.

Because of Respondents' failure to discuss the above issues no further comment is required in this reply brief. Only those areas which are specifically discussed by Respondents will be addressed by these amicus curiae. As a general note, the regulations which allegedly will go into effect in January of 1993 should have no effect upon this Court's decision concerning the due process rights of inmates. While the effort of the Board of Pardons is commendable, it must be kept in mind that such amendment would not have occurred had this Court not rendered the Foote decision. Since regulations can come and go at the whim and caprice of the Board of Pardons, it is essential that this Court establish judicial principles of due process which will insure that all future regulations contain the required procedure. Otherwise, the regulations now being argued by the respondents today in support of their due process claims could be repealed next year if no judicial standards are established.

A. Attorney Representation.

Respondents make many untrue assertions in their argument that attorney representation is not needed in original parole revocation hearings. For example, at the present time the offender is not given a full opportunity to rebut any information relied upon by the Board and afterwards by way of personal correspondence with the Board. See opening Brief of these amicus curiae pages 27-31.

Likewise, the use of a special attention hearing or a petition for rehearing is solely discretionary with the Board and is only granted in exceptional cases. Such procedures cannot be used in place of an effective advocacy proceeding in the first instance.

The claim that the present rule permits the Board to make determinations of attorney representation is also erroneous. These amicus curiae know of no instance in which an attorney has been allowed to actively represent and participate in an original parole hearing. When these inflated claims of present procedure are eliminated from Respondents' arguments, the need for attorney representation becomes more apparent.

Respondents claim that "an attorney in a parole grant hearing provides little if any value in protecting an offender's interest in the possibility of parole." (Respondents' Brief, 34). While this statement may be true in some routine cases, it is certainly not true in many cases. An attorney can assist an inmate in reviewing the file for accuracy, in refuting prejudicial or erroneous information, and in making a formal presentation to the Board. Often, inmates do not have the verbal skills required to

eloquently state the basis of their situation.

The remainder of the arguments raised by Respondents are hardly worthy of comment. While it may be said technically that the Board acts in a parens patriae relationship with an offender, the reality of the relationship is far different. The Board has publicly proclaimed on numerous occasions that its first interest is to protect the public generally and the victims specifically from any wrongful conduct that could be caused by an inmate. As such, therefore, the interest of the prisoner is subordinate to the other competing interests. To state that this is similar to an employee-employer relationship where a "supervisor strives to better the company by improving the subordinates" is bordering on the absurd. (Respondents' Brief, 35). To deny that the Board of Pardons is adversarial to the inmate is to deny realtity. Moreover, to claim that an attorney would interfere with the "dialogue between the offender and the decision maker" is also equally out of reality. Certainly judges have no difficulty in sentencing offenders to incarceration even though the offender is represented by an attorney during the proceeding.

The final arguments raised by Respondents would qualify as an ad populum falacy, i.e., argument of emotion and prejudice rather than reason. Utilizing budget propaganda, Respondents paint a bleak picture of attorneys depleting "the state's already limited resources, of attorneys asking for unnecessary time delays and clogging the overburdened calendar of the Board, and using courtroom antics to obtain a more favorable ruling for their client." (Respondents' Brief, 36-37). These amicus curiae submit

that this "flood gate" argument is completely without merit. Most parole matters could be handled extremely expeditiously by attorneys in preparing their client's presentation. In many cases they could even shorten the hearing process by eliminating unnecessary issues before the Board. Likewise, the Board will have its power to regulate its own calendar just as does a court and any abuses by attorneys can be handled administratively or through attorney disciplinary actions. These same arguments have been made throughout the course of judicial history each time it is decided that an accused, defendant, or inmate is entitled to increased legal representation.

Finally, an "all or nothing" approach of representation is not the only alternative. Assuming that the inmates have proper access to their file, attorney representation could be limited to those instances where the inmate disputes relevant information contained in the file or where his or her sentence will exceed the matrix guideline established in the trial and post-trial proceedings. Since many inmates have pled guilty in complete reliance upon these matrixes thereby saving the state millions of dollars each year in trial costs, it is only proper that some additional expense be incurred whenever these matrix guidelines are being exceeded.

B. Access to the Board's Files.

The heart of the Foote litigation concerned his inability to know what accusations were being made against him by anonymous letters contained in the file of the Board of Pardons. Many of these amicus curiae inmates have similar instances in which they

believe their sentences have been wrongfully extended because of such information. In some cases confusion of inmate names has resulted in incorrect criminal records being charged against parole seekers. These amicus have previously discussed this important right in their opening Brief. (Amicus Curiae Brief, 22-26).

Attached to this Brief are several letters of correspondence between inmates and the prison administration concerning access to files. These documents show that inmates attempting to obtain access to their file still face formidable obstacles in obtaining the relevant information upon which the Board will base its decision. For example, even though a defendant has presumably seen his presentence report at the time of the court-imposed sentencing he is nevertheless denied access to this report for review during his entire imprisonment even though such report may be extremely pertinent to the decision by the Board.

The implementation of the new Government Records Access and Management Act is of little assistanceto the inmates. Section 63-2-304 provides that the following are deemed "protected records:"

* * *

> 9. Records the disclosure of which would jeopardize the life or safety of another individual;
>
> * * *
>
> 11. Records that, if disclosed, would jeopardize the security or safety of a correctional facility, or records relating to incarceration, treatment, probation, or parole, that would interfere with the control and supervision of an offender's incarceration, treatment, probation or parole;

> 12. Records that, if disclosed, would reveal recommendations made to the Board of Pardons by an employee of or contractor for the Department of Corrections, the Board of Pardons, or the Department of Humane Services that are based on the employee's or contractor's supervision, diagnosis, or treatment of any person within the Board's jurisdiction.

Moreover, if an inmate is to have any ability to obtain improperly classified documents he will need many months to appeal an adverse ruling under the appellate provision of the section. 63-2-409, et seq. Certainly, the present seven-day notice of hearing is totally inadequate to make any attempt to obtain documents under this new management act.

It is respectfully suggested that the procedures urged in the opening brief by these amicus curiae and formulated by several courts throughout the country be adopted as the procedure for access to inmate information. The new access to information law shall be used to supplement any deficiencies which may be found to exist under the prison access system.

C. Evidentiary Hearings.

The requirement of an evidentiary hearing is closely related to the access of an inmate's file by the inmate or his attorney. If, for example, the file contains no information that the inmate opposes the need for an evidentiary hearing would be minimal. In those cases where claimed erroneous information exists, however, an evidentiary hearing may be essential to eliminate false information or false accusations. See opening Brief of these amicus curiae pages 27-31.

Once again Respondents argue emotion rather than reason. They contend that if additional procedures are implemented the

normal twenty-minute per case hearing time will increase thereby decreasing the number of available hearings per year. Respondents contend, "As a result, the Board will be forced to limit the number of times an inmate will be heard and/or lengthen the number of years an inmate will have to wait prior to receiving an original or redetermination hearing." (Respondents' Brief, 38).

Certainly, an inmate who may be facing a five or six year rehearing is entitled to the fullest due process protection available in insuring that a fair decision is made. Part of the present problem may well be that the twenty-minute allotment per case is simply insufficient. If additional time is required in order to insure a fair hearing then it will be up to the Legislature of this state to provide additional staff to provide adequate hearings. The "floodgate" argument cannot be used by Respondents to deny inmates the opportunity of a fair hearing when essentially their entire lives are at stake. Just as in the case of double-bunking and other constitutional mandated requirements, the state is obligated to comply with judicial mandates even though it is not a financially pleasant obligation. Similarly, the fact that additional attorneys may be needed to represent the state in any type of evidentiary hearing is not a reason to deny the existence of such hearings when necessary.

Finally, the purpose of evidentiary hearings is not to retry the conviction of an inmate but is to insure that accurate and reliable information is being presented to the Board in making its parole determination. In many instances, the false or malicious information that is contained in the Board's file is given by

non-victims who for one motivation or another wish to keep the inmate incarcerated. Frequently, for example, ex-spouses, other inmates and personal enemies are the sources of information that the Board of Pardons relies upon in making its determination. Since the victim is already allowed by Utah law to openly express their feelings and since the inmate is allowed by Utah law to respond to such expression, the requirement of an evidentiary hearing would in very few instances have any effect on victims themselves.

CONCLUSION

The Respondents have spent nearly three-fourths of their Brief in arguing why the question of inmate rights during parole hearings should not be decided by this Court. Understandably, the Respondents wish to avoid this Court determined question since such avoidance will allow them to carry on business as usual. Change is always feared--the Board of Pardons is no exception.

Just as in many instances in the past, however, change is required under our living and dynamic constitutional system of law. That which was accepted in the past can no longer be tolerated in the present. Rights of slaves, women, workers, minorities, handicapped are all significantly different than when these issues were first litigated. Likewise, the time has come to decide what rights some 5,000 state inmates are entitled to assert when their day of actual sentencing arrives--the parole hearing before the Board of Pardons.

These amicus curiae inmates are grateful to have had the opportunity to input their thinking into this extremely

significant decision. It is hoped that this Court will provide substantial due process procedures in the future to insure that all inmates will be treated fairly in the parole proceedings that govern their collective and individual fate.

DATED this 23rd day of December, 1992.

Craig S. Cook
Attorney for Utah State
Prison Inmates Amicus Curiae

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing to Lorenzo Miller, Assistant Attorney General, 6100 South 300 East, Suite 204, Murray, Utah 84107, Joan Watt, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111; and V. Lowrey Snow and Lewis P. Reece, Snow & Jensen, 150 North 200 East, Suite 203, St. George, Utah 84770, this 23rd day of December, 1992.

ADDENDUM

ROGER S. LEFEVRE #21439
WASATCH BAKER 213
P.O. BOX 250
DRAPER, UTAH 84020-0250

November 24, 1992

Administrator
Board of Pardons
State of Utah
448 East 6400 South (Third Floor)
Murray, Utah 84107

Re: Request for Access to Information

Dear Administrator:

In accordance with R655-303 (Offender Access to Information) of the Utah Administrative Code, and the mandate of the Utah Supreme Court[1], please be kind enough to provide me with copies of the documents and other information which is contained in my file maintained at the Board of Pardons and/or Utah Department of Corrections. I understand that there might be a charge for these copies.

Thank you for your assistance with this request.

Respectfully,

Roger S. LeFevre

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[1] State v. Sanwick, 713 P.2d 707 (Utah 1986)

Norman H. Bangerter
Governor
H.L. (Pete) Haun
Chairman
Donald E. Blanchard
Michael R. Sibbett
William L. Peters
Heather N. Cooke
Members

State of Utah
BOARD OF PARDONS

448 East 6400 South - Suite 300
Murray, Utah 84107
(801) 261-6464

December 1, 1992

Roger S. Lefevre, USP# 21439
Utah State Prison
P. O. Box 250
Draper, Utah 84020

Dear Mr. Lefevre:

This letter is in response to your request for information in your file.

Like other offenders' files, your file contains its own variation of the following categories of information:

(1) Public information, including judgment and commitment orders, prior Board dispositions, and parole agreements;

(2) Information generated from Adult Probation and Parole, including presentence and postsentence reports, probation violation reports, parole progress and violation reports, and diagnostic reports;

(3) Prison information, including Board reports, disciplinaries, progress and rescission reports, and psychologicals;

(4) Information generated internally for the Board, including its own work product, routings, worksheets, guidelines matrices, alienist reports, and warrant requests;

(5) Other criminal justice information including police reports and prosecutorial reports, recommendations from sentencing judges, criminal record data, other court documents;

(6) All correspondence sent to the Board from and concerning you.

In accordance with Chapter 2, Title 63, Government Records Access and Management Act, the Board of Pardons shall provide you with a copy of public and private records in your file. These documents include disposition forms reflecting the Board's prior decisions concerning you, letters to and from you, and information submitted by you or at your request.

Many of the documents in your file cannot be released because they affect not just your privacy interests, but also the privacy and safety interests of persons who submitted information to the Board. Access to other documents is specifically restricted by statute; for example, the presentence investigation report, institutional progress report and diagnostic reports.

We have reviewed your file and have approximately 11 pages which may be released to you. Upon receipt of the copying costs of .10 cents per page, a total of $1.10, we will forward the photocopied documents to you.

Pursuant to Utah Code Annotated, Section 77-27-8 and administrative policy, the Board will provide you with a cassette recording of the hearing for a $5.00 fee, which represents the cost of the cassette and processing fee. If you desire a type written transcript, copies may be obtained for $2.25 per page after you remit a $20.00 deposit. The average length is 10 to 15 pages with a processing time of one month. If however, you state in an Affidavit that you are unable to pay for a transcript which is necessary for further proceedings, and the Affidavit is not refuted, the Board may order that a copy of the hearing be furnished to you at no expense. Before we can process your request, you will need to forward your full name, USP#, and date of the hearing.

In anticipation of your next hearing before the Board, the Board will provide a written notice of the hearing to you and a summary of the information it intends to use in making its decision. This summary will not disclose controlled, protected, or confidential information where prohibited by law. At the hearing, the Board will verbally summarize any additional information that may influence the Board's decision. Before any decision is reached, you will be given the opportunity at that hearing to respond to the information.

If you allege a factual inaccuracy in any of the summarized information, the Board shall, as to each matter controverted, either make a finding as to the allegation or make a determination that no such finding is necessary because the matter controverted will not be taken into account in the Board's decision.

I hope this has answered your inquiry.

Respectfully,

John Green
Administrative Coordinator

November 24, 1992

NOV 2 4 1992

Mr. Alan Anthony
Administrator
Field Operations, Region III
Department of Corrections
State of Utah
275 East 200 South, Suite 100
Salt Lake City, Utah 84111

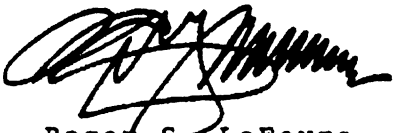
Re: Request for copy of Presentence Report

Dear Mr. Anthony:

In accordance with Rule 4-203 of the Utah Code of Judicial Administration, and the mandates by decision of the Utah Supreme Court[1], please be kind enough to provide me a copy of my Presentence Report completed in March 1990 (along with any supplement thereto).

Your assistance with this request is appreciated.

Very truly yours,



Roger S. LeFevre

#21439
Utah State Prison
Wasatch Baker 213
Draper, Utah 84020

rsl

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[1] State v. Lipsky, 608 P.2d 1241 (Utah 1980), State v. Casarez, 656 P.2d 1005 (Utah 1982), and State v. Howell, 707 P.2d 115 (Utah 1985).

Norman H. Bangerter
Governor
O. Lane McCotter
Executive Director
James H. Gillespie Jr.
Director, Field Operations

State of Utah

DEPARTMENT OF CORRECTIONS
FIELD OPERATIONS

Region III
275 East 200 South, Suite 100
Salt Lake City, Utah 84111
(801) 533-4984

December 1, 1992

Mr. Roger S. LeFevre
#21439
Utah State Prison
Wasatch Baker 213
Draper, Utah 84020

Dear Mr. LeFevre:

I am in receipt of your letter dated November 24, 1992 requesting a copy of your Presentence Investigation Report. We give out that report as provided in 77-18-1 Utah Code or under order of the court. 77-18-1 specifies that the presentence report is confidential and, as it pertains to you, is limited to "...the defendant or his counsel for sentencing purposes only...". Since your sentencing has already occurred, it is the position of our agency that you are not entitled to a copy of the report at this time.

Sincerely,

ALAN ANTHONY, Regional Administrator

cc: Ray Wahl, Deputy Director
Field Operations